ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 399. Argued April 19, 20, 1916.—Decided May 22, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that a verdict in an action under the Federal Employers' Liability Act which is not unanimous, but which is legal under the law of the State, is not violative of the Seventh Amendment, and that such Amendment has no application to proceedings in state courts.

The fact that after the close of the testimony a plaintiff suing under both the Employers' Liability Act and the Safety Appliance Act withdrew his claim under the latter act, *held* in this case not to amount to a withdrawal of the testimony in regard to defective condition of the appliances and entitle defendant to direction of verdict on the ground of assumption of risk as the testimony was admissible under the issues based on the former act.

The fact that the state appellate court may have inaccurately expressed in one respect its reasons for affirmance, does not require this court to reverse, if, in fact, no reversible error exists.

The trial court having instructed the jury that if they found the plaintiff guilty of contributory negligence they should reduce his damages

in proportion to the amount of negligence attributable to him, failure to define the word proportion *held* in this case, not error.

THE facts, which involve the validity of a verdict and judgment for damages under the Employers' Liability Act, are stated in the opinion.

Mr. C. B. Stuart, Mr. W. I. Cruce, Mr. L. S. Dolman, Mr. A. C. Cruce and *Mr. M. K. Cruce* were on the brief, for the defendant in error.[1]

Mr. W. F. Evans, Mr. R. A. Kleinschmidt and *Mr. J. H. Grant* were on the brief, for the plaintiff in error.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Basing his cause of action upon the Federal Employers' Liability and Safety Appliance Acts, Brown, the defendant in error, sued to recover damages resulting from injuries alleged to have been occasioned by the negligence of the Railroad Company while he was in its employ and engaged in interstate commerce. At the close of the testimony the claim under the Safety Appliance Act was withdrawn and the case was submitted to the jury alone upon the Employers' Liability Act. There was a verdict and judgment for the plaintiff which was affirmed by the court below.

There was a sharp conflict between the testimony offered on behalf of the plaintiff and that on behalf of the defendant. The material facts disclosed by the plaintiff's testimony are as follows: Brown, a head brakeman and other members of a local freight train crew on the day in question were engaged in the yards at Ashdown, Arkansas, in making up an extra freight train to be taken out by an extra crew to Hugo, Oklahoma. The cars intended

[1] See note on p. 212, *ante*.

for the interstate train were placed on an east and west passing track east of a switch connecting a spur track which ran in a northeasterly direction past a stave mill. After placing some cars from the spur track on the passing track the engine returned to the spur track with several cars, some of which were to be left at the mill and the remainder brought out and coupled to those already collected for the train and standing on the passing track. Brown accompanied the cars and after cutting off those intended for the mill gave the engineer a signal to go ahead, the engine being headed west, and when the cars approaching the switch came opposite the car on the passing track to which the coupling was to be made, Brown crossed over from the spur track to the passing track to adjust the coupler on the car standing there. Finding the knuckle of the coupler closed, he attempted to open it with the lever at the side of the car, but it did not work. He then tried to manipulate the knuckle with his hand, but could get it only part way open and closing it, he stepped out to the north side of the track (the engineer's side). As the last car coupled with the engine was then just clearing the switch, he gave the engineer a stop signal and walked west to the switch stand to set the switch so that the engine and cars might be backed to make the coupling. By the time he had walked the short intervening distance and set the switch the engine had come to a stop with the rear car a few steps west of the switch. Intending then to adjust the coupler on the end of this car, Brown gave the engineer, who was watching him, a "spot" signal which indicated that he was not to move the engine until a further signal was given by Brown, and crossed over to the south side of the track in order to use the lifting pin to open the knuckle of the coupler. When the lever failed to work he stepped behind the car and was about to try to open the knuckle with his hand when he heard the cars ahead of him move. He at once turned to leave the

track, but was struck and knocked down by the car which was backed in disregard of the "spot" signal and his feet were caught under the wheels and crushed.

The assignments of error are numerous, but those requiring to be specially noticed may be disposed of under three headings:

1. The contention that rights of the Railroad Company guaranteed by the Seventh Amendment were violated because only nine of the twelve jurors concurred in the verdict is without merit. *Minneapolis & St. Louis R. R.* v. *Bombolis*, *ante*, p. 211.

2. A twofold contention is based upon rulings concerning the doctrine of the assumption of the risk. Upon the withdrawal by the plaintiff of his claim under the Safety Appliance Act the court charged the jury concerning assumption of the risk as follows:

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

(a) It is insisted that the abandonment of the claim as to a violation of the Safety Appliance Act necessarily withdrew all evidence tending to show that the couplers were defective and in the absence of such evidence the proof established as a matter of law that the plaintiff assumed the risk and the court should have directed a verdict in favor of the railroad. We think the proposition is plainly without merit. The testimony concerning

the condition of the couplers was clearly admissible under the issues based on the Employers' Liability Act as explaining the occasion for Brown's being on the track and as negativing negligence on his part. In so far as the contention implies that the withdrawal of the claim was a concession that the testimony relating to the couplers was false, we think the conclusion is wholly unwarranted. If we were to conjecture as to the reason for the abandonment of the claim under the Safety Appliance Act, we think it at least quite as probable that plaintiff's counsel were of opinion that in the situation disclosed by the plaintiff's testimony the Safety Appliance Act was inapplicable.

(b) In the court below it would seem that the correctness of the general instruction as to assumption of the risk which we have quoted as given by the trial court was challenged on a ground which has been abandoned because not here pressed. But it is said reversible error exists because the court below in passing upon such objection remarked that as the "defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress," assumption of the risk was not a defense. This it is said was erroneous, first, because so far as the Safety Appliance Act was concerned, it was inapposite, as reliance upon that law by the plaintiff had been disclaimed, and second, because, under the facts it was open to find the existence of assumption of the risk depending upon conditions of fact not involved in the Safety Appliance Act. But we fail to see the pertinency of this objection, as there is now no contention concerning the correctness of the charge as to assumption of the risk upon which the case was submitted to the jury for their verdict. At best therefore the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of

reversing the judgment although no reversible error exists.

3. It is contended that the court erred in charging the jury that in the event they found the plaintiff guilty of contributory negligence they should "reduce his damages in proportion to the amount of negligence which is attributable to him," since the court did not define the word proportion and hence failed to fix any standard by which the damages should be measured. The charge is clearly distinguishable from the instruction disapproved in *Seaboard Air Line* v. *Tilghman*, 237 U. S. 499, which is relied upon, since in that case the jury were in effect instructed to diminish the damages according to their conception of what was reasonable. The instruction given is almost in the identical language of the statute and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed. It is true the company made a request on the subject which the court declined to give, but that request, we are of opinion, taken as a whole instead of clarifying any ambiguity deemed to exist in the instruction which the court gave would have served to obscure it. There was no error therefore, leaving aside the question whether the requested instruction did not contain matters which if given would have been erroneous.

Although we have examined the whole record and as the result of that examination conclude there is no ground for reversal, we have not particularly noticed subjects embraced by some of the assignments but not pressed in argument and others not embraced by the assignments but indirectly referred to in the argument.

Affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* CARNAHAN.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 743. Argued April 19, 20, 1916.—Decided May 22, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that the contention that in trial of cases under the Employers' Liability Act the parties are entitled under the Seventh Amendment to a common-law jury of twelve men is untenable.

When the evidence shows that there will be future effects from an injury, an instruction which justifies their inclusion in the award for damages is not error.

Where the court explicitly enjoins the jury that there must be a proximate and causal relation between the damages and the negligence of the defendant and refers to the amount stated in the declaration as a limitation on the amount that can be awarded, and there is no misunderstanding as to the purpose of such reference, there is no error.

THE facts, which involve the validity of a verdict and judgment for personal injuries under the Employers' Liability Act, are stated in the opinion.

Mr. David H. Leake, with whom *Mr. Walter Leake* was on the brief, for the plaintiff in error.[1]

Mr. C. W. Allen and *Mr. H. W. Walsh* filed a brief for defendant in error.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment in favor of defendant in error for $25,000 damages for injuries sustained through the asserted negligence of plaintiff in error.

The action was at law under the Employers' Liability Act of Congress. April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291. In accordance with the state law it was tried to a jury of seven. This is assigned as error. The only other assignment is upon an instruction of the court as to the elements of damage. There is no dispute as to the fact of injury or that it was received in interstate commerce and by the negligence of plaintiff in error.

(1) The first assignment of error is based upon a challenge by the railway company to the array of jurors on the ground that the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States. In other words, the contention is "that in the trial of cases under the Employers' Liability Act of Congress the parties are entitled to a common-law jury of twelve men, as provided for by the Seventh Amendment to the Constitution of the United States."

The assignment is without foundation. *Minn. & St. Louis R. R.* v. *Bombolis*, decided this day *ante*, p. 211.

[1] See note on p. 212, *ante*.

(2) The instruction which is the basis of the second assignment of error is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

It is objected (a) that the instruction permitted a recovery in damages not only for those which proximately resulted from the injury but also for "its effects upon the future," which involved a consideration of consequences which might be essentially speculative and remote. (b) The instruction directed the jury that the damages might be in such sum not in excess of $35,000 as to them might seem just and fair. By the instruction the court called the attention of the jury to a certain sum and gave judicial approval of it, giving them to understand that they could give such sum as they might deem just and fair, without regard to the damages the evidence might prove.

The injury received is pertinent to the consideration of the instruction. In the collision of two trains defendant in error, who was a fireman, "was caught" (we quote from the opinion of the Supreme Court) "from his knee of his right leg down, between the tank on the tender and the boiler head in the cab of his engine, and remained pinned in that position for forty-five or fifty minutes before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for these injuries and his consequent sufferings that he sues to recover damages."

The Supreme Court expressed the view that the speculation of future results which the railway company professed to apprehend was not left by the instruction for the jury to indulge, nor did the instruction commit the amount of damages to the conjecture of the jury independently of the evidence in the case. The contention made here was explicitly rejected, viz., that the instruction permitted the jury to take into consideration the "'possible future physical effects from the injury, such as future suffering in the absence of evidence as to the probability of such.'" The court remarked that it would be a strained construction of the language of the instruction "to hold that it referred to future suffering and that damages not the proximate result of the injuries received were included under" it, and that, besides, such conclusion was precluded by an instruction given at the request of the railway company, which was "that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant."

The comment of the court is accurate and we can add nothing to it. The principle is established that when the evidence in a case shows that there will be future effects from an injury an instruction which justifies an inclusion of them in an award of damages is not error. *Washington & Georgetown R. R.* v. *Harmon*, 147 U. S. 571; *McDermott* v. *Severe*, 202 U. S. 600.

It is also objected that the instruction "allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000 and allowed the jury to give such sum as damages as to them might 'seem just and fair' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of."

The objection is untenable. As we have seen the court

explicitly enjoined upon the jury that there must be a proximate and causal relation between the damages and the negligence of the company and the reference to the sum of $35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction. *Norfolk & West. R. R.* v. *Earnest,* 229 U. S. 114, 119.

Judgment affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* STEWART, ADMINISTRATRIX OF STEWART.

STEWART, AS ADMINISTRATRIX OF STEWART, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Nos. 485, 904. Argued April 19, 20, 1916.—Decided May 22, 1916.

A verdict and judgment thereon in a state court in a suit by an administrator under the Employers' Liability Act, based on an instruction that the jury should find, if anything, such a sum as will fairly compensate the intestate's estate for his death, and which has been set aside for error of such instruction by the state appellate court, cannot be reinstated by this court on a writ of error to the appellate court of the State after judgment for a lesser amount on the second trial has been affirmed by that court.

Quære, whether such a verdict and judgment could be reinstated had there been no error in law in the instructions given at the first trial.

Minn. & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that the verdict of a jury, legal under the state law but which would not be legal in a Federal court, is not a denial of Federal right under the Seventh Amendment in a suit brought in a state court under the Employers' Liability Act.

The due process provision of the Fourteenth Amendment does not require a State to provide for suspension of judgment pending appeal nor prevent its making it costly in case the judgment is upheld; nor is due process denied by adding ten per cent., as is done under the statute of Kentucky, on the amount of judgment if the same is affirmed.

The opinion of both courts below being against defendant's contention that this case should have been withdrawn from the jury, this court not disagreeing with them, affirms the judgment.

163 Kentucky, 823, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action in the state court under the Employers' Liability Act, are stated in the opinion.

Mr. Benjamin D. Warfield, with whom *Mr. James C. Sims* and *Mr. John B. Rodes* were on the brief, for Louisville and Nashville Railroad.

Mr. George H. Lamar, with whom *Mr. B. F. Procter, Mr. C. U. McEllory* and *Mr. D. W. Wright* were on the brief, for Stewart.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, against the Railroad Company for negligently causing the death of the plaintiff's intestate, her husband. There were two trials. A verdict and judgment for the plaintiff at the first were set aside by the Court of Appeals. 156 Kentucky, 550; 157 Kentucky, 642. A judgment for a less amount at the second trial was sustained. 163 Kentucky, 823. The Railroad Company seeks to overthrow the last judgment; the plaintiff by her cross writ seeks to reinstate the first, but failing that contends that the last should be affirmed, denying, that is, that there are any grounds for the Railroad Company's writ.

The object of the plaintiff's writ of error was to go behind the second trial and reinstate the first judgment. But the verdict was found upon an instruction that the jury should find, if anything, 'such a sum as will fairly compensate his estate for his death,' given it would seem in forgetfulness that the case arose under the act of Congress. See 157 Kentucky, 642. This instruction was excepted to and neither justice nor law would permit the verdict and judgment based upon it to be reinstated after the state court had set it aside. We therefore examine the arguments in 904 no farther and do not consider whether if in our opinion there had been no error of Federal law at the first trial the plaintiff could have had the relief that she asks. *Fairfax* v. *Hunter,* 7 Cranch,

603, 628. *Jones National Bank* v. *Yates*, 240 U. S. 541, 563.

The Railroad Company had for its principal object in bringing the case here to set up the Seventh Amendment, and to deny jurisdiction in any state court where a verdict of nine or more out of the twelve men on the jury was allowed by the local law. The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least as between the United States and a State, unless by procedure identical with that of the first is disposed of in *Minneapolis &c. R. R.* v. *Bombolis*, *ante*, p. 211.

The first of the other objections is that the Court of Appeals was not authorized to add ten per cent. damages on the amount of the judgment, as it did. But the Railroad Company obtained a supersedeas, and the law of the State makes ten per cent. the cost of it to all persons if the judgment is affirmed. There was no obligation upon the State to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So the State may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as but for such proceedings interest would run as of course until the judgment was paid.

The Railroad Company contends at some length that the case should have been taken from the jury by the direction of a verdict in its favor. As the opinion of both courts below and the jury were against it and as we agree with their judgment we shall not discuss this assignment of error at length. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464, 466. The facts were these: Stewart, the deceased, was engineer on a north-bound freight train upon a single track, that had to go upon a siding to make way for a south-bound freight train. There were cars already on the siding which Stewart's train pushed ahead, and this

train and the cars more than filled the siding. Therefore they pushed forward onto the main track to the rear of the south-bound train and the latter went on its way. It still, however, was necessary to keep the main track clear for another south-bound train, and therefore Stewart's train began to back so as to free the main track north of the switch which would be the first point reached by the expected train. While it was backing and approaching the southerly end of the switch the rear brakeman suddenly applied the airbrakes and the sudden shock caused the engineer to strike his head against the cab, by reason of which he died. The conductor in charge of the movement testified that he intended not to cross the southerly point of the switch and it could be found that the brakeman's act was a breach of duty, that it manifestly would cause a sudden shock, and that although the particular position of, or specific damage to Stewart was unknown to the brakeman, generically it was the kind of thing that was likely to happen, and that he and his employers were liable for consequences of that sort. The jury was instructed that Stewart assumed the risks incident to his employment and that if the application of the airbrakes was made upon a reasonable belief that it was necessary to apply them in order to avoid injury to property, they should find for the defendant unless they found that the emergency was brought about by the defendant's servants in the negligent operation of the train before the brakes were applied. As an abstract proposition the qualification was correct, and the jury might have found that the conductor did not manage the train with due care and so made the application necessary. Whatever might have been our opinion had we been in the jury's place we do not feel warranted in saying that they had no evidence to go upon or that the instructions were wrong.

Judgment affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* GAINEY, ADMINISTRATOR OF DWYER.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 453. Submitted April 19, 20, 1916.—Decided June 5, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis, ante*, p. 211, followed to the effect that the Seventh Amendment does not apply to actions brought in the state courts under the Federal Employers' Liability Act.

Chespeake & Ohio Ry. v. *Kelly, ante*, p. 485, followed to the effect that in estimating the amount of damages recoverable under the Employers' Liability Act, the interest bearing capacity of a present award must be considered; and the whole loss sustained by the beneficiaries during the period that the benefits cover cannot be included in the verdict without rebate or discount.

162 Kentucky, 427, reversed.

THE facts, which involve the application of the Seventh Amendment to cases in the state court under the Employers' Liability Act, the construction of that act, and the validity of a judgment thereunder, are stated in the opinion.

Mr. E. L. Worthington, Mr. W. D. Cochran, Mr. Le-Wright Browning and *Mr. P. K. Malin* for plaintiff in error.[1]

Mr. R. S. Dinkle and *Mr. Watt M. Prichard* for defendant in error:

Complaint that certain phraseology used in the measure of damage instruction was misleading is without merit, because it is evident that plaintiff in error was not prejudiced thereby.

Present cash value theory is not correct in principle and has never been sanctioned by the Supreme Court of the United States or lower Federal courts. *C. & O. Ry. Co.* v. *Kelly's Admr.*, 160 Kentucky, 296.

There was no substantial error in the measure of damage instruction, as a consideration of it as a whole shows clearly that the jury were limited to finding the "pecuniary loss" to the dependent beneficiary.

If errors were in the measure of damage instruction, same were invited by plaintiff in error and were not properly preserved as ground of error either under the state practice or the practice of this court. *L. & N. Ry. Co.* v. *Woodford*, 153 S. W. Rep. 722; 156 Kentucky, 398; *Patterson* v. *Moss*, 97 S. W. Rep. 397; 30 Ky. L. R. 10; *L. & N. Ry. Co.* v. *Wilkin's Guardian*, 136 S. W. Rep. 1024; *L. & N. Ry. Co.* v. *Simrall's Admr.*, 127 Kentucky, 55; 104 S. W. Rep. 1011; *Loughridge* v. *Baugh*, 118 S. W. Rep. 321; *Burdette* v. *Mullin's Exr.*, 110 S. W. Rep. 855; *Ill. Central Ry.* v. *Skaggs*, 240 U. S. 66.

Mr. Justice Pitney delivered the opinion of the court.

This was an action under the Employers' Liability Act of Congress of April 22, 1908, as amended April 5,

[1] See note on p. 212, *ante*.

1910 (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291). It was brought to recover damages for the death of Richard Dwyer, caused by the negligence of the railroad company, while he was in its employ in interstate commerce. The sole beneficiary was decedent's widow, who originally qualified as administratrix and brought the action, but has died since the allowance of the present writ of error.

Laying aside a contention based upon the Seventh Amendment to the Federal Constitution, which has been disposed of in *Minneapolis & St. Louis R. R.* v. *Bombolis*, *ante*, p. 211, the only question raised relates to the method adopted in ascertaining the damages. The jury returned a verdict for $16,000. On appeal to the Kentucky Court of Appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the verdict of $16,000 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The court overruled this contention, on the authority of *Ches. & Ohio Ry.* v. *Kelly's Admx.*, 160 Kentucky, 296, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the Court of Appeals in the present case (162 Kentucky, 427) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict. Since we have held, in *Ches. & Ohio Ry.* v. *Kelly, Admx.*, this day decided, *ante*, p. 485, that the theory is erroneous, it results that the judgment here under review must be

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.